

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT J. KAYTES  
Plaintiff,

v.

SCOTTSDALE INSURANCE COMPANY  
Defendant.

:  
: CIVIL ACTION  
:  
: NO. 97-3225  
:  
:  
:  
:

MEMORANDUM-ORDER

GREEN, S.J.

December 8, 1997

Presently before the court is the Motion of Defendant Scottsdale Insurance Company ("Scottsdale") for Summary Judgment, the Cross-Motion of Plaintiff Kaytes ("Kaytes") for Summary Judgment, and Scottsdale's Response to Kaytes's Cross-Motion. For the reasons set forth below, Scottsdale's Motion is granted and Kaytes's Motion is denied.

**FACTUAL BACKGROUND**

The facts of this case are not in dispute. Kaytes is the residential landlord of a house located at 2402 Mountain Street, Philadelphia, Pennsylvania. In November, 1995 Dorothy Bradshaw brought suit against Kaytes on her own behalf and on behalf of Michael Anthony Cooper II in the Court of Common Pleas of Philadelphia County in the action captioned Michael Anthony Cooper, II, a minor by his legal guardian, Dorothy Bradshaw, and in her own right v. Albert J. Kaytes, Ind. and t/a Albert J. Kaytes & Co., November Term 1995, No. 360 (C.P. Philadelphia County, Lead Case - Code #19)("Cooper action"). The Cooper action alleges Cooper resided at 2042 Mountain Street from 1988 to 1989. The Plaintiffs in the Cooper action claim damages for

bodily injuries allegedly caused by Cooper's ingestion and/or inhalation of lead-based paint.

The Defendant issued Commercial General Liability Insurance Policy No. GSL163081 to Kaytes, effective February 20, 1988 to February 20, 1989 ("Scottsdale Policy"). Kaytes gave timely notice of the Cooper action to Scottsdale and made a claim for coverage under the Scottsdale Policy. Defendant refused to defend or indemnify Kaytes in the Cooper action based on an absolute pollution exclusion clause in the Scottsdale Policy. The Scottsdale Policy provides coverage for "bodily injury or property damage" to which an exclusion does not apply. The pollution exclusion clause in question provides in pertinent part:

This insurance does not apply:

(1) to bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

(a) at or from premises owned, rented or occupied by the named insured.

. . .

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

On May 5, 1997 Kaytes filed a Complaint against Scottsdale for a declaratory judgment and damages for bad faith based on Scottsdale's failure and refusal to defend or indemnify Kaytes in the Cooper action.

## DISCUSSION

Summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). The evidence presented must be viewed in the light most favorable to the non-moving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983).

The Third Circuit Court of Appeals affirmed a decision by the district court that the same absolute pollution exclusion contained in the Scottsdale Policy precludes coverage for claims of bodily injury caused by lead poisoning. St. Leger v. American Fire and Cas. Ins. Co., 61 F.3d 896 (3d Cir. 1995). The lower court was presented with facts similar to the present action with the underlying suit claiming damages based on the ingestion and/or inhalation of lead-based paint in an apartment. St. Leger v. American Fire and Cas. Ins. Co., 870 F. Supp. 641 (1994), aff'd, 61 F.3d 896 (3d Cir. 1995). The court in St. Leger concluded that lead paint is a pollutant within the meaning of the exclusion in the policy, and the Third Circuit affirmed

that opinion. Id. at 643. See also Kaytes v. Imperial Casualty & Indemnity Co., 1994 WL 780901 (E.D. Pa. 1994).

Accordingly, this court concludes that lead paint is a pollutant as defined in the Scottsdale Policy. Kaytes argues that even if the court concludes that lead paint is a pollutant, the exclusion does not apply because the injury resulted from something other than "discharge, dispersal, release or escape of pollutants" as provided in the exclusion clause. This court disagrees. As Judge Bartle noted in St. Leger, "[i]ngestion of household dust containing lead released by lead paint is the most common cause of lead poisoning in children." St. Leger, 870 F. Supp. at 643 (citing 42 U.S.C. § 4851(4)(emphasis added)). This court concludes that the lead found in dust or paint chips does constitute the release of a pollutant as defined in the Scottsdale policy. Therefore, bodily damages resulting from the inhalation and/or ingestion of lead-based paint is excluded from coverage under the Scottsdale Policy.

Kaytes claims that because the Cooper action contains claims for Negligence and Noncompliance, Breach of the Implied Warranty of Habitability, Intentional Infliction of Emotional Distress and Unfair Trade Practices and Violations of the Consumer Protection Act, these claims are potentially within the scope of the Scottsdale Policy notwithstanding the pollution exclusion clause. Plaintiffs' claims in the Cooper action for Negligence and Noncompliance and Breach of the Implied Warranty of Habitability rely on Plaintiffs' underlying allegation that bodily injuries

resulted from exposure to lead-based paint. This court has already concluded that this type of bodily injury is specifically excluded from the Scottsdale Policy.

With regard to Plaintiffs' claim in the Cooper action for Intentional Infliction of Emotional Distress, Kaytes has not pointed to any provision of the Scottsdale Policy which covers damages for emotional distress injuries. To the extent Plaintiffs' claim for emotional distress contemplates a type of "bodily injury," such injury would be precluded by the pollution exclusion clause. Kaytes has also failed to identify any coverage in the Scottsdale Policy for monetary damages arising from claims under The Unfair Trade Practices and Consumer Protection Law. Because the Scottsdale Policy only provides coverage for bodily injury or property damage, any claim for monetary damages resulting from Kaytes's retention of rent or security deposits would not be covered under the Scottsdale Policy. In light of the above, Kaytes has failed to produce facts sufficient to raise a genuine issue of material fact that Scottsdale has a duty to defend or indemnify him for any claim in the Cooper action.

Finally, Kaytes claims that Scottsdale acted in bad faith in failing to defend or indemnify him in the Cooper action. This court concludes that the earlier decision in St. Leger provided Scottsdale with a reasonable basis for denying benefits under the Scottsdale Policy. Therefore, Kaytes has failed to produce

sufficient evidence for a reasonable jury to conclude that Scottsdale acted in bad faith.

An appropriate Order follows.

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SCOTTSDALE INSURANCE COMPANY	:	
Defendant.	:	

ORDER

AND NOW, this 8th day of December, 1997 IT IS HEREBY ORDERED that Defendant Scottsdale Insurance Company's Motion for Summary Judgment is GRANTED and Plaintiff Kaytes's Cross-Motion for Summary Judgment is DENIED.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.